A- 360 (5)

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Opposition to Application for Stay of Execution.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying McFarland's motion for appointment of counsel and application for stay of execution is not published. It is attached as Appendix A to the petition.

JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McFarland bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

The State has lawful custody of McFarland pursuant to a judgment and sentence of the Criminal Court Number 3, Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. McFarland was represented at trial by Tolly Wilson and Sharen Wilson of Fort Worth. Trial on the merits commenced on October 26, 1989. On November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Texas Code of Criminal Procedure, article 37.071(b) (Vernon Supp. 1991).[1] Thereafter, the trial court sentenced McFarland to death by lethal injection.

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[1] Pursuant to article 37.071, McFarland's jury was required to answer the following special sentencing issues:

> Special Issue No. 1
>
> Was the conduct of the Defendant, Frank Basil McFarland, that caused the death of Terry Hokanson, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Special Issue No. 2

McFarland's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. McFarland was represented on direct appeal by Jack V. Strickland and Michael Ware of Fort Worth. On September 23, 1992, the Court affirmed McFarland's conviction and sentence. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993.

Mr. Strickland evinced his intent to continue representing McFarland in this Court by filing a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. The motion was granted, and mandate was stayed until March 12, 1993. In April, following the receipt of correspondence from the Center, McFarland wrote to Mr. Strickland. Following that correspondence, Mr. Strickland no longer appeared as counsel of record.

Thereafter, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari in the United States Supreme Court. Certiorari was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). Over two months later, on August 16, 1993, the state convicting court Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland. The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant

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> Is there a probability that the Defendant, Frank Basil McFarland, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr. II: 436-37. "Tr" refers to the transcript of McFarland's trial, followed by the volume and page. "R" refers to the statement of facts of his trial, followed by the volume and page number.

County District Attorneys' office. Lamberty asked the Court to withdraw McFarland's execution to allow the Center to find new counsel, and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland, and again asked the court to withdraw the execution date. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. Neither the stay application or motion for appointment of counsel were presented to the trial court. The Court of Criminal Appeals denied the application for stay and motion on Friday, October 22, 1993. It is from this denial that McFarland seeks a writ of certiorari.

The same day, with the assistance of the Center, McFarland filed *pro se* Motion for Stay of Execution and for Appointment of Counsel in the United States District Court for the Northern District of Texas, Fort Worth Division. No federal habeas corpus petition was filed. The State's Opposition to the motions was filed on Monday, October 25, 1993, and the district court denied the motions the same day. The district court denied a certificate of probable cause on Tuesday, October 26, 1993.

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

> Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the two men. Appellant, Wilson, the

victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.

Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been discovered. An autopsy revealed that the victim had been stabbed by a least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had

left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a Rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

I.

McFARLAND'S UNREASONABLE, ABUSIVE DELAY DISENTITLES HIM TO THE EQUITABLE REMEDY OF A STAY OF EXECUTION.

McFarland asserts that his death sentence was imposed in violation of the Eighth and Fourteenth Amendments for two reasons: (1) the state courts denied him meaningful access to the Texas judicial system in order to file a state post-conviction writ, and (2) the refusal of the Texas courts to appoint counsel for post-conviction proceedings violated his federal right to counsel. Because of the last-minute nature of his application for a stay, the Court need not address the merits of the claim. In *Gomez v. United States District Court for the Northern District of California*, 112 S.Ct. 1652, 1653 (1992), the Court noted:

> Even if we were to assume, however, that Harris could avoid the application of *McCleskey [v. Zant*, 111 S.Ct. 1454] to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. See *In re Blodgett*, ___ U.S. ___, 112 S.Ct. 674 (1992); *Delo v. Stokes*, 495 U.S. 320, 110 S.Ct. 1880 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Similarly, McFarland has had ample opportunity to present before now any claims that he wishes to raise in state or federal habeas corpus. Indeed, contrary to the Center's complaint, it has had more than ample time to recruit counsel for McFarland. The Center, in fact, recruited counsel for certiorari review, although prior appellate counsel had evinced a desire in the Court of Criminal Appeals to seek certiorari review in this Court. McFarland's conviction became final on June 6, 1993, with the Court's denial of certiorari. The trial court waited until August 16, 1993, to schedule his execution for September 23, 1993. McFarland was allowed a 30-day modification of that date, until October 27, 1993,

in which to file a state habeas application. While careful to state that it was not representing McFarland, before each pending execution date the Texas Resource Center asked the trial court to withdraw its order to allow the Center an unspecified time to recruit new counsel and "120 days from the appointment of new counsel" to file a state habeas application. McFarland never asked the trial court to appoint counsel to represent him in state habeas, and never requested that his execution date be modified or stayed for a specified time period to enable him to find counsel or to file a *pro se* habeas application. In short, he never asked the trial court for what he now seeks.

Bypassing the trial court, with the assistance of Center, on Thursday, October 22, 1993, McFarland filed a *pro se* motion for stay and for appointment of counsel in the Texas Court of Criminal Appeals which was denied the following day. The same *pro se* motions are currently pending in the federal district court. To date, no habeas petition has been filed in either state or federal court. By choosing to wait until the eleventh hour, McFarland has engaged in an obvious attempt to manipulate the judicial process. His actions disentitle him to the equitable relief of a stay of execution.

II.

McFARLAND'S CLAIM IS NOT PROPERLY BEFORE THE COURT, BECAUSE IT WAS NOT PRESENTED TO THE COURT BELOW.

Relying on *Murray v. Giarratano*, 109 S.Ct. 2765 (1989), McFarland argues that his federal constitutional right of access to the courts guaranteed by the Eighth Amendment and the Due Process Clause was denied by the Texas Court of Criminal Appeals' denial of his motion for appointment of counsel and application for stay of execution. McFarland's federal constitutional claim was not presented to the Texas Court of Criminal Appeals.

As set forth *supra*, McFarland's "*pro se*" motion for appointment of counsel and stay of execution was never properly filed in the trial court. In his motion for appointment

of counsel, McFarland stated that he (1) wished to seek state habeas relief, (2) lacked the resources, training, and knowledge to file a state habeas application, (3) was not represented by legal counsel, and (4) had asked the Texas Resource Center to recruit counsel for him. According to McFarland, the recent modification of execution date from September 23, 1993, to October 27, 1993, was insufficient to allow the Center to recruit counsel.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates,* 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Hill v. California,* 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington,* 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

III.

THE STATE COURT'S FAILURE TO APPOINT COUNSEL TO ASSIST IN THE FORMULATION OF HIS STATE HABEAS APPLICATION IMPLICATES NO CONSTITUTIONAL GUARANTEE.

Not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v.*

Giarratano, 109 S.Ct. 2765 (1989); *Pennsylvania v. Finley,* 481 U.S. 551, 557 (1987). In *Giarratano,* Chief Justice Renquist speaking for the plurality of the Court, concluded that neither the Eighth Amendment nor due process require a state to appoint counsel to assist death-sentenced inmates in state collateral review. 109 S.Ct. at 2771.

McFarland relies on Justice Kennedy's concurrence and the dissent in *Giarratano* for the proposition that a failure to provide indigent capital habeas petitioners with appointed counsel violates their constitutional right of access to the courts. McFarland's reliance is misplaced. In Texas, the initiation of state habeas proceedings by a death-sentenced inmate is triggered by the setting of an execution date. At that time, counsel is either appointed by the trial court[2] or recruited by the Texas Resource Center to assist the inmate in state habeas review. In his dissent in *Giarratano,* Justice Stevens noted that, of the 37 States authorizing capital punishment, 18 automatically provided indigent death row inmates with counsel to initiate their state habeas proceeding and 13, among these Texas, have governmentally funded resource centers to assist counsel in litigating capital cases. Representation is thus provided to Texas' death-sentenced inmates by either of the alternative methods approved by the dissent.

This is not a case in which there is no mechanism in place to provide counsel to a death sentenced inmate and, thus, does not raise the issue that McFarland argues was left open in *Giarratano.* McFarland's petition for certiorari review on direct appeal was filed on March 9, 1993, by Resource Center recruited counsel. Moreover, certiorari review was denied by the Court on June 6, 1993. The alleged inability to recruit counsel or itself provide representation to McFarland in state collateral review can only reflect, at best, the

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[2] Article 1.051 (d) (3) of the Texas Code of Criminal Procedure provides as follows:

> (d) An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and post-conviction matters:
>
> (3) a habeas corpus proceeding if the court concludes that the interests of justice require representation;

most abysmal lack of record keeping by the Texas Resource Center and a resulting failure to secure McFarland's easily anticipated need for representation. Alternatively, the alleged failure to recruit state habeas counsel can be understood by its consequences to be an attempt to manipulate the appearance of a crisis in representation when in fact none exists--a delay mechanism to the review process that should not be tolerated by the Court.

IV.

McFARLAND HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

In deciding whether to grant a stay of execution, the Court is guided by the following standard:

> "'[T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.'"

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983), quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (quoting *Times-Picayune Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974)). Because the federal constitutional issue raised by McFarland was not presented to the court below, the jurisdiction prerequisite for certiorari review is lacking. Moreover, the failure to appoint state habeas counsel does not implicate McFarland's constitutional right of access to the courts and thus, does not justify a stay.

V.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the application for stay be denied.

Respectfully submitted,

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